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JUSTICE AT WORK

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September 17, 2015

Special Advisors
Changing Workplaces Review
Employment Labour and Corporate Policy Branch, Ministry of Labour
400 University Ave., 12th Floor
Toronto, ON M7A 1T7

Dear Sirs:

Re: Amalgamated Transit Union Local 113's Submissions to the Changing Workplaces Review
Our File: 0018001

Please find enclosed the submissions of our client, the Amalgamated Transit Union, Local 113, to the Changing Workplaces Review. Bob Kinnear will be making a presentation to the Special Advisors on September 18, 2015 with respect to these submissions.

Yours truly,

Ursel Phillips Fellows Hopkinson LLP

per

Ian J. Fellows
IJF/ka/ps

Enclosure

c.c. Bob Kinnear

Presented on September 18, 2015

ATU, Local 113 – Submissions to the Changing Workplaces Review

Introduction

The Amalgamated Transit Union, Local 113 ("ATU 113") welcomes this opportunity to participate in a much-needed public consultation about how Ontario's labour and employment laws should be modernized.

We are enthusiastic that the Review has a broad mandate to report on the changing nature of work in Ontario and to make recommendations about how the *Labour Relations Act, 1995* and *Employment Standards Act, 2000* can be improved to address these changes.

At the outset, we commend the Review for its early recognition that the structure of work in the province has grown increasingly precarious over the last few decades.[1] As set out in the Review's *Guide to Consultations*, this is a problem that has many contributing factors including the growth of the service sector, globalization, economic incentives to utilize non-standard work arrangements, and declining unionization rates.

From ATU 113's perspective, however, the dominance of these factors over workers' lives is not just a chance phenomenon but rather the direct result of government policies which have eroded the social safety net and favoured corporate success in the free market over the most basic rights of workers.

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1 C. Michael Mitchell and the Honourable John C. Murray, *Changing Workplaces Review Guide to Consultations* (May 2015) See http://www.labour.gov.on.ca/english/about/pdf/cwr_consultation.pdf

We hope, on a broader level, that the Review recognizes the inherent vulnerability of "non-standard" employment arrangements and that Ontario needs a statutory scheme that ensures that all workers, whether unionized or not, can obtain a living wage[2] and employment security. For this reason, we urge the Review to adopt all 14 recommendations made by the Ontario Federation of Labour, including those on how the *ESA* should be modernized to better improve the lives of migrant and non-unionized workers.[3] We also support the recommendations for reform set out in the submissions of ATU Canada and ATU 107, which were presented to the Special Advisors on September 10, 2015.

In our submissions today, however, we want to focus on a narrow issue of great concern to our membership – how the *LRA*'s sale of business / related employer provisions should be modernized to address the rise of privatization and the contracting out of government services.

These submissions first outline the significance of this problem in the transit sector and then make recommendations on how the legislation can be reformed to prevent the erosion of bargaining rights caused by public-private subcontracting. While we draw from our own experience, we note that this is not a transit specific issue. It is issue that has broad implications for all service industries, including health care, construction and food and cleaning services.

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2 Defined by the Canadian Centre for Policy Alternatives an income allowing a family with two wage-earners to fully participate in economic and social life. In Toronto in 2015, this equates to approximately $16.60 per hour or roughly $33,000 annually for each wage-earner in a two parent household. See Kaylie Tiessen, *Making Ends Meet* (April 2015) at https://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2015/04/CCPA-ON_Making_Ends_Meet.pdf

3 Ontario Federation of Labour's Preliminary Submission to Changing Workplaces Review. See http://ofl.ca/wp-content/uploads/2015.06.17-PreliminarySubmission-LabourLaw.pdf

The Experience of Local 113 Members in the Changing Workplace

ATU 113 represents over 10,000 transit workers employed by the Toronto Transit Commission, as well as hundreds of other transit workers employed by other municipalities and / or private-sector companies that contract with municipalities to provide transit services.

ATU 113's membership is made up of highly skilled bus drivers, streetcar and subway operators, maintenance and cleaning staff, collectors, administrative staff, and customer service representatives. ATU 113 members come from a diverse range of backgrounds, and many are new immigrants to Canada.

For decades, ATU 113 has fought hard to secure for its members a living wage, a modest health and welfare benefits package, and a pension on which its members can comfortably retire at the end of a long career. In this sense, we have strived to see transit work become the cornerstone of the middle class. We have sought to create careers - rather than jobs - for our members, and we have done this because we believe stability in employment is a fundamental worker's right, and indeed, fundamental to social progress as a whole.

However, like in most service industries, the ability to make a career in transit is being frustrated by the rise of P3 partnerships and the outsourcing of work to private companies who win their contracts through a tendering war that is better characterized as a race-to-the-bottom. Governments and these private contractors then utilize novel corporate structures and highly structured contracts to defeat bargaining rights and otherwise decrease labour standards.

To provide a practical example of this problem, I want to outline Local 113's experiences representing transit workers in York Region over the last five years.

York Region has privatized its transit services, such that transit work is contracted out to a number of different companies which ostensibly assume responsibility for operating transit on a particular line or in a particular geographic area of the region. Bidding is done by tender; the company that offers the lowest bid will win the contract for a specified period of time. However, once the services are contracted out, York Region retains significant control over fundamental aspects of the work including the ownership of buses, employee training, scheduling of routes and breaks, employee performance and discipline, the appointment of management personnel, hours of work, and safety checks.[4] York Region also has complete control over how it structures its contractual relationship with the contractor, such that it can insert, for example, a clause into the contract that allows the cancellation of the contract in the event of a strike or labour dispute.

This structure introduces great instability into the lives of transit workers, since there is no guarantee that the company who wins the contract one year will go on to win that same contract the next time it is put up for tender. There is also no guarantee that the company holding the contract will keep its corporate structure the same during the life of the contract. All this uncertainty has rendered transit workers employed by subcontractors uniquely susceptible to precarious employment arrangements and attacks on their bargaining rights.

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4 See i.e. discussion in *York (Regional Municipality)*, [2012] O.L.R.D. No. 4165 at para. 9.

In 2010, Can-Ar Transit, a division of Tokmakjian Group, lost its contract to perform certain transit services for York Region. The contract terminated on July 31, 2010 and was awarded to a different company, Veolia.

Veolia did not automatically retain Can-Ar employees; the employees were required to apply for positions with Veolia in order to retain their positions. Ultimately, thirty-nine (39) former Can-Ar Transit employees were not hired by Veolia. Only Veolia knows why it weeded out those 39 Can-Ar employees; without the automatic transfer of bargaining rights, workers are left with little protection from discrimination in hiring by the new contractor on basis of union activism or a human rights ground. Further, Veolia did not automatically continue the terms and conditions of employment of the former Can-Ar employees. Specifically, at the point of transfer it refused to recognize the previous seniority of the employees it retained from Can-Ar.

In 2011-2012, First Student Canada held a contract with York Region to provide transit services. In October 2011, the employees of Frist Student Canada went on strike. On January 16, 2012, York Region terminated First Student Canada's contract, relying on a provision therein which allowed the municipality to terminate the contract in the event of a labour dispute lasting more than 30 days. Ultimately, the Region was able to put First Student's 84 unionized members out of a job specifically because they were engaging in a lawful strike. The York Region contract previously held by Can-Ar Transit was awarded to Tok Transit Limited, a division of Tokmakjian Group, effectively eliminating union representation for the employees operating transit services under this contract.

In 2014, York Region approved the transfer of the VIVA Bus Rapid Transit contract from York BRT to Tok Transit Limited. Our bargaining rights went with that contract. While

Tok rehired some of our former members, it did not hire all of them and we do not know how their new wages / benefits compare to what they were receiving under the Local 113 contract.

Ultimately, within the last five years there has been no less than three (3) transit contract changes within York Region alone. In each case, employees have lost jobs, lost employment conditions, and in each case bargaining rights have effectively been terminated, all without any protection to ensure that employees are not weeded out by the new contractor based on union activism or discriminatory grounds.

I think the York Region example illustrates the broader problems caused by P3s and the tendering of public sector service contracts – they increase employment instability, they encourage low wages and more precarious employment arrangements, like part-time and casual work, and, finally, they reduce accountability for service quality and safety. This is despite the fact that the government retains complete control over how it structures its contract with the private entity, including when it can terminate that contract, all the while offering a permanent service to the public. If transit work is to be permanent service offered to the public, why should transit workers be treated like a temporary workforce?

Local 113 has expended a lot of energy advocating against the use of P3s because of the devastating effects they have on labour standards. Nonetheless, to the extent that governments deem P3s to be short-term cost-saving measures, we believe the *LRA* needs to be reformed to ensure that the brunt of such measures are not borne by transit workers alone. For this reason, we are recommending a modernization of the *LRA*'s related / successor employer provisions.

The Need to Reform the Related / Successor Employer Laws in Ontario

Ontario's related / successor employer provisions are outdated.

Various academics have acknowledged that there is no longer one "true" employer" in most employment situations.[5] The growth of flexible forms of work, vertical disintegration, and the rise of network enterprises have all undermined the legal concepts of "employer" and "employee", and yet our current legislative model looks to these concepts to determine the scope of bargaining rights in subcontracting scenarios.[6] This is a triumph of form over substance.

From Local 113's perspective, the York Region examples discussed above are symptoms of a greater problem, which can only be addressed through legislative reform. The current tests to define what is a related employer or sale of business are premised on the misguided notion that the employer is a single discernible entity – namely, that the Employer is *either* the contractor or the municipality. Under our current legislative model, the Board has been clear that it will be reluctant to recognize bargaining rights in most subcontracting scenarios, and that it specifically cannot recognize bargaining rights "upstream" from subcontractor to a public entity, even if the tendering process or contractual arrangement is specifically used to defeat bargaining

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5 Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, (2006) 44 Osgoode Hall L. J. 609-648; Judy Fudge and Kate Zavitz, *Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario* (2006-2007) 13 CLELJ 107-146; Benjamin Kates, *The Supply Chain Gang: Enforcing the Employment Rights of Subcontracted Labour in Ontario* (2012) 16 CLELJ 449-480.

6 Fudge and Zavitz, *supra* at para. 1.

rights.[7] In the Board's view, this is simply not *the type* of attack on bargaining rights the related / successor employer provisions were meant to address.[8]

Well, unfortunately, the changing nature of work means that this is exactly the type of attack on bargaining rights that our membership will face in the years to come. In our submission, the structure of the present legislative model ignores the fact that bargaining rights should attach to the work and workforce, not the technical entity (or entities) said to be behind the direction of the work. Recently, our Supreme Court has acknowledged the inherent vulnerability of workers to the superior economic power of management.[9] The related employer / sale of business law, as it exists right now in Ontario, fails to recognize that this vulnerability is heightened where the structure of 'management' is fragmentized across numerous entities or service providers, all with an economic incentive to avoid accountability for labour rights.[10]

These problems are conceptual problems – they cannot be solved by developing a better test for identifying what entity is the 'true' employer.[11] We must detach the law from the outdated notion of a fixed and stable employer and refocus it on the fact that bargaining rights attach to the work and workforce, not the entities directing that work.

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7 See i.e. *York (Regional Municipality)*, [2012] O.L.R.D. No. 4165; *Ottawa Community Care Access Centre*, [2008] OLRB Rep. September/October 671; *Durham Access to Care*, [2000] OLRB Rep. November/December 1108.

8 *York (Regional Municipality)*, *supra* at para. 51.

9 *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at paras. 31-32.

10 For an explanation of how the current legislative model is reactive and perpetuates uncertainty, see Henry J. Glasbeek, "Agenda for Canadian Labour Law Reform: A Little Liberal Law, Much More Democratic Socialist Politics" Osgoode Hall Law Journal 31.2 (1993) at pp. 243-246.

11 Fudge, *supra* at para. 3.

Proposed Alternate Models

From Local 113's perspective, the best way to address these problems is to reform the *LRA* to ensure that (1) related employer designations can be made upstream in public-private contracting scenarios and (2) to provide that employment obligations and bargaining rights automatically transfer with any change in service.

One legislative option would be to carve out provisions that specifically define when a 'sale of business' or 'related employer' designation occurs in public-private subcontracting situations. Importantly, each definition must recognize that there is no conceptual or theoretical basis to prevent the recognition of bargaining rights 'upstream' from contractor to the government where the government ultimately controls the life of the contract, as in the First Student example discussed above.

This is not a radical proposal. Practically speaking, it could be accomplished by reinstating the protections that were provided through Bill 40[12] with respect to subcontracting by a building owner, and then extending those protections to all service industries, or particularly in public-private subcontracting situations. Whatever the legislative model adapted, the ultimate focus of the successor or related employer designation must be on the continuity of work and workforce, not identifying the legal entity *most* responsible for the direction of work and then artificially designating that one entity responsible for all labour obligations. It is important that the new regime recognize

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12 These were the amendments to the *Labour Relations Act* introduced by the NDP government in 1993 but repealed by the Conservative government in 1995. The effect of s. 64.2 of Bill 40 was to attach bargaining rights in subcontracting scenarios by building owners to the relationship between the employees, their work and their workplace, regardless of who happened to be their technical employer at any given time. See the former *Labour Relations Act,* RSO 1990, c L.2 at s. 64.2.

that in public-private contracting scenarios, both the government and the contractor (or, in some cases, the series of contractors) need to respect bargaining rights and owe collective agreement obligations to the workforce.

A second, or additional, legislative option could be modeled on how European Union Directive 2001/23 has been implemented in the United Kingdom.

Under the United Kingdom's *Transfer of Undertakings Regulations 2006*[13] ("TUPE"), employment and bargaining rights transfer with any "service provision change." A service change is defined broadly and includes outsourcing to a contractor, situations where a new contractor takes over the activities of an old contractor, and situations when a company or the government takes in-house activities from a contractor.

TUPE provides that in any service change, bargaining rights and collective agreement obligations automatically transfer (regardless of whether the service is transferred to a public or private entity). As well, terminations are deemed automatically unfair if they are caused by the service provision change.[14] Under TUPE, it does not matter who the technical 'employer' is; bargaining rights are protected presumptively and at first instance, when that protection is needed most. However, if a new contractor believes that it has not actually taken over the service provided by the old contractor, it can bring an application and establish that it will not or does not carry on activities similar to the former service provider. In this sense, TUPE strikes an appropriate balance between protecting employment stability and the economic interests of employers.

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13 See http://www.legislation.gov.uk/uksi/2006/246/contents/made.
14 *Ibid.*

Conclusion

Given the recent trend towards the fragmentation of the service industry, it is imperative that steps are taken to protect workers from the inherent vulnerability associated with race-to-the-bottom contract tendering. We believe that amendments to the *LRA*'s related /successor employer provisions could be part of the solution to this problem.

Thank you for taking the time to listen to and consider our submissions.

Bob Kinnear

President, ATU Local 113